

**In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division**

In the matter of:)	
)	Chapter 7 Case
DOUG E. STUART)	
)	Number <u>02-43960</u>
<i>Debtor</i>)	

**MEMORANDUM AND ORDER
TRUSTEE’S MOTION FOR COMPENSATION AND EXPENSES**

Wiley A. Wasden, III, the duly appointed Chapter 7 Trustee in the case of Doug E. Stuart (the “Debtor”), has filed a Motion for Compensation of Accountants and Attorneys; Payment of Chapter 7 Trustee’s Commission and Expenses. *See* Dckt. No. 138 (December 28, 2005). Creditors M. Randall Hall (“Hall”) and Dallas Spring Corporation (“Dallas Spring”) object to the Chapter 7 Trustee’s request for compensation and expenses. *See* Dckt. Nos. 143 (January 18, 2006) and 144 (January 18, 2006).

FINDINGS OF FACT

Prior to the filing of this Chapter 7 case, the Debtor had filed a Chapter 13 case in this Court. *See* Case No. 01-43939. While a creditor’s motion for relief from the automatic stay was pending in that Chapter 13 case, the Debtor filed a motion to voluntarily dismiss that case. At a hearing held on October 30, 2002, the Debtor’s counsel argued that the Debtor had an absolute right to a dismissal of the Chapter 13 case. The Court announced at that hearing that the case would be dismissed, and on November 11, 2002, an order

dismissing that case was entered.

Three weeks later, on December 2, 2002, Hall obtained a judgment against the Debtor in the Magistrate Court for Chatham County in the amount of \$12,000.00 plus court costs and was granted immediate possession of the rental property and a general lien on all of the Debtor's leviabale property. Nearly an hour after the rendering of this state court judgment, the Debtor filed this Chapter 7 case. The Debtor's wife has a separate Chapter 7 case currently pending. *See* Case No. 02-43724.

Six hours after the Debtor filed this Chapter 7 case, Hall filed a Motion for Expedited Relief from the Automatic Stay, which he served on the Chapter 7 Trustee. *See* Dckt. No. 4 (December 2, 2002). This motion stated that the Debtor had been in a Chapter 13 case that had been dismissed on November 11, 2002, but sought only stay relief and not the dismissal of the Chapter 7 case. The motion did not argue that the Debtor's case was ripe for dismissal pursuant to 11 U.S.C. 109(g)(2).¹

The Debtor owned an alignment shop that could not be sealed from exposure to the public and co-tenants in the building, and items were being carried out and taken from

¹ Hereinafter, all section references are to Title 11 of the United States Code. Because this case was filed on December 2, 2002, the Bankruptcy Code as it existed prior to the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") on October 17, 2005 governs this matter. Section 109(g)(2) provides:

Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if—

(2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.

the business. To prevent this removal of assets and business equipment, the Chapter 7 Trustee called the police and asked them to mark the property with crime scene tape. On December 5, 2002, the Chapter 7 Trustee filed a Motion to Appoint Auctioneer and Allow Sale by Public Auction in an attempt to affect a sale before all inventory and items were removed from the premises. *See* Dckt. No. 9 (December 5, 2002). On December 10, 2002, an associate in the law firm for the Chapter 7 Trustee contacted Bob Cassidy of the Chapter 13 Trustee's Office to investigate the Debtor's previous Chapter 13 case.

At the January 2003 meeting of creditors, it was determined that the Debtor and his wife jointly owned property that had significant equity. The Chapter 7 Trustee filed three motions in January to sell the Debtor's encumbered property to recover this equity. *See* Dckt. Nos. 33 (January 9, 2003), 45 (January 30, 2003), and 46 (January 30, 2003). By April 2003, almost everything had been liquidated. Because the Debtor and his wife had so much jointly-owned property yet had separate bankruptcy cases, the funds were held in one bank account pending allocation and distribution by the Chapter 7 Trustee to their individual creditors.

On April 4, 2003, Hall filed a Motion to Dismiss on the grounds that the Debtor failed to qualify as a debtor and committed fraud regarding his insolvency at the time of filing his petition. *See* Dckt. No. 87 (April 4, 2003). This was the first time Hall raised the argument that the Debtor's Chapter 7 should be dismissed pursuant to Section 109(g)(2). On July 31, 2003, this Court granted the motion and entered a Memorandum and Order on Motion to Dismiss Case. *See* Dckt. No. 109 (July 31, 2003).

With the dismissal of the Debtor's case, the Chapter 7 Trustee had to trace each asset to determine which proceeds belonged to the Debtor and which proceeds belonged to his wife. Costs also had to be properly allocated. On June 29, 2004, the Chapter 7 Trustee filed a Motion to Separate Funds Held in Trust. *See* Dckt. No. 121 (June 29, 2004). No creditor filed an objection to this motion or appeared at the July 21, 2004, hearing to oppose this motion. The Court entered an Order granting this motion to split the proceeds. *See* Dckt. No. 124 (July 27, 2004).

The Chapter 7 Trustee filed tax returns for the Debtor's estate for the period when it was a bankruptcy estate. Resolution with the Internal Revenue Service was ultimately achieved. *See* Dckt. No. 132 (June 24, 2005).

On December 6, 2005, the Chapter 7 Trustee filed a motion to conduct a final distribution of the Debtor's portion of the funds to his creditors. *See* Dckt. No. 133 (December 6, 2005). Objections were raised to this motion, which prompted the Chapter 7 Trustee to elect to dismiss the motion. Believing that this Court retained jurisdiction over allowance of administrative expenses, the Chapter 7 Trustee took the money that exceeded estimated administrative expenses in the Debtor's case and filed an interpleader action in Chatham County Superior Court.

ARGUMENTS OF THE PARTIES

The Chapter 7 Trustee asserts that he performed reasonable and necessary work on behalf of the Debtor's estate. He demonstrated that he liquidated the Debtor's

property and recovered the Debtor's equity from the sales by April 2003. The Chapter 7 Trustee collected these funds and separated the assets belonging to the Debtor from those belonging to his wife, whose bankruptcy case is currently pending. He resolved the Debtor's tax issues with the Internal Revenue Service by June 2005. Finally, the Chapter 7 Trustee took those funds that exceeded this case's administrative expenses and delivered them to the Chatham County Superior Court to commence an interpleader proceeding.

Hall and Dallas Spring assert that the Chapter 7 Trustee is not entitled to compensation because he failed to fulfill his duty under Section 704(1), which includes the duty to "collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest." 11 U.S.C. § 704(1). Hall and Dallas Spring contend that the Chapter 7 Trustee had a duty at the beginning of this case to investigate the Debtor's petition. If he had, they argue, the Chapter 7 Trustee would have discovered that the Debtor had secured the dismissal of his previous Chapter 13 following a creditor's request for stay relief within 180 days of the filing of the present case. They claim that a proper investigation by the Chapter 7 Trustee would have led him to conclude that the best way to resolve this case would have been through dismissal, which would have obviated the need for all the litigation in this case and left the Debtor's assets intact, subject to creditors' state law claims.

CONCLUSIONS OF LAW

Although it was not an issue contested by the parties, this Court's jurisdiction over the distribution of funds as administrative expenses should be noted.

Although the Debtor's Chapter 7 case was dismissed, I conclude that this Court retained jurisdiction to determine the distribution of funds *in custodia legis* as well as attorney's fees on the basis of recognized jurisdictional principles as well as the Court's obligation to regulate the practice of counsel before it. See In re 5900 Associates, L.L.C., 326 B.R. 402, 410 (E.D. Mich. 2005)(citations omitted).

The Chapter 7 Trustee carries the burden of demonstrating that he is entitled to the fees and compensation he has requested. In re Garcia, 317 B.R. 810, 827 (Bankr. S.D. Cal. 2004). It is the Court's responsibility to review the evidence presented by the Chapter 7 Trustee and consider whether the request is reasonable pursuant to Section 330. Id. Section 330 provides:

- (a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, or a professional person employed under section 327 or 1103—
 - (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and
 - (B) reimbursement for actual, necessary expenses.

Section 330(a)(3) guides the Court in determining the amount of reasonable compensation and provides:

(a)(3) In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—

- (A) the time spent on such services;
- (B) the rates charged for such services;
- (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
- (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and
- (E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

This Court is not permitted to allow fees and compensation for services that were not “reasonably likely to benefit the debtor’s estate” or “necessary to the administration of the case.” 11 U.S.C. §§ 330(a)(4)(A)(ii)(I) and (II). In determining whether there is a right to fees and compensation under Section 330(a) and in what amount, a two-step analysis must be conducted. In re Channel Master Holdings, Inc., 309 B.R. 855, 861 (Bankr. D. Del. 2004). This Court must first determine that the Chapter 7 Trustee performed actual and necessary services. Id. While it should be noted that the benefit to the estate is important to this analysis, a trustee’s services for administering the estate are also compensable. See In re Dragone, 324 B.R. 445, 447 (Bankr. D. Conn. 2005)(noting that even if professional services do not benefit the estate, they may still be compensable if they were “necessary to the administration of the case”); In re Concrete Products, Inc., 208 B.R. 1015, 1024 (Bankr.

S.D. Ga. 1996)(Davis, J.)("[A] court must determine whether at the time the attorney performed the services were they reasonably likely to benefit the debtor."). The first prong of the creditors' objections asserting that the Chapter 7 Trustee should receive zero or virtually zero compensation due to the eligibility issue will be addressed in this Order. Since I conclude that those objections will be overruled, the Court must then assess whether the Chapter 7 Trustee has assigned reasonable values to the services performed. Id.

This Order will first address the services provided by the Chapter 7 Trustee prior to July 31, 2003, the date the Debtor's case was dismissed. In January 2003, the Chapter 7 Trustee submitted motions to sell two parcels of real property as well as several trucks. With a few changes to the motion to sell the trucks, this Court granted these motions to sell. *See* Dckt. Nos. 58 (February 20, 2003), 83 (April 4, 2003), and 97 (May 2, 2003). In addition, the Chapter 7 Trustee submitted a final report concerning the sale of the trucks. *See* Dckt. No. 94 (April 29, 2003). Also in January 2003, the Chapter 7 Trustee objected to the Debtor's claimed exemptions. *See* Dckt. No. 34 (January 9, 2003). The Chapter 7 Trustee filed another motion in February 2003 to sell another parcel of real property owned by the Debtor. *See* Dckt. No. 60 (February 25, 2003). This motion was also granted by this Court. *See* Dckt. No. 85 (April 4, 2003). Furthermore, the Chapter 7 Trustee successfully defended against Hall's April 14, 2003 motion seeking an award of administrative expenses. *See* Dckt. No. 118 (November 25, 2003).

Only Hall and Roberts Truck Center filed objections to the Chapter 7 Trustee's motions to sell the Debtor's property. Roberts Truck Center contended that the

Chapter 7 Trustee's motion to sell certain trucks should have been denied to the extent it covered trucks in which Roberts Truck Center had a perfected security interest. *See* Dckt. No. 53 (February 5, 2003). Hall's objection focused on the valuation of the property and the manner in which the sales were to be conducted. *See* Dckt. Nos. 79 (March 28, 2003) and 81 (April 3, 2003). Neither of these objections raised the argument that the Debtor's case should have been dismissed pursuant to Section 109(g)(2).

Under Section 704(1), it is the Chapter 7 Trustee's duty to "collect and reduce to money the property of the estate for which such trustee serves" 11 U.S.C. § 704(1). Prior to the dismissal of the Debtor's case, the Chapter 7 Trustee performed the mandatory duty of collecting the Debtor's property and then liquidating that property. *See In re Midway Airlines, Inc.*, 154 B.R. 248, 256-57 (N.D. Ill. 1993) ("The trustee of a Chapter 7 debtor has the general duties of marshalling all available property, reducing it to money, distributing it to creditors, and closing up the estate."). As it is a duty to perform such services, the Chapter 7 Trustee's services with respect to these activities were necessary. The Chapter 7 Trustee's sale of the Debtor's encumbered property served to pay off the liens attached to the property as well as to collect the remaining equity in the property for the benefit of unsecured creditors. Furthermore, the Chapter 7 Trustee submitted reports upon the completed sale of the property, in accordance with his duty under Section 704(2).² These are basic services required by the Code of the Chapter 7 Trustee and were necessary for the administration of the Debtor's bankruptcy estate. Therefore, I conclude that these are

² Section 704(2) provides that a trustee shall "be accountable for all property received." 11 U.S.C. 704(2).

compensable services.

The Court must also address the Chapter 7 Trustee's services after the Debtor's case was dismissed on July 31, 2003. Following the dismissal of the case, the Chapter 7 Trustee moved to separate and divide the funds held in one bank account in the names of the Debtor and his wife. *See* Dckt. No. 121 (June 29, 2004). The Court granted this motion. *See* Dckt. No. 124 (July 27, 2004). Furthermore, between July 2004 and June 2005, the Chapter 7 Trustee filed tax returns on behalf of the Debtor for the time when he was in bankruptcy. Resolution of any tax issues with the Internal Revenue Service were achieved by June 2005. *See* Dckt. No. 132 (June 24, 2005). Finally, the Chapter 7 Trustee filed a motion with this Court to distribute the Debtor's portion of the funds collected during the pendency of his bankruptcy case. *See* Dckt. No. 133 (December 6, 2005). After objections were raised, the Chapter 7 Trustee withdrew the motion and filed an interpleader action in the Chatham County Superior Court concerning the funds in excess of the case's estimated administrative costs.

Although these services were performed after the Debtor's case was dismissed, they are "inextricably intertwined" to the services performed by the Chapter 7 Trustee prior to dismissal. *See In re Washington*, 232 B.R. 814, 816-17 (Bankr. S.D. Fla. 1999)(permitting compensation to a Chapter 7 trustee and her attorneys for services performed after the conversion of the debtor's case to Chapter 13 because the services benefitted the estate, were reasonable and necessary, and interrelated to pre-dismissal services). Prior to the dismissal of the case, the Chapter 7 Trustee had liquidated the

Debtor's property, satisfied any encumbrances, and collected the remaining equity in a bank account. Separating the Debtor's portion of the equity from his wife's portion,³ filing tax returns for the period when the Debtor was in bankruptcy,⁴ and commencing an interpleader action in a state court to disburse the remaining funds to unsecured creditors⁵ are post-dismissal services that are "inextricably intertwined" with the Chapter 7 Trustee's pre-dismissal services. Therefore, I conclude that these are also compensable services.

Hall and Dallas Spring contend that the Chapter 7 Trustee is not entitled to compensation and expenses due to a failure to comply with Section 704(1), which requires a trustee to "collect and reduce to money the property of the estate for which such trustee serves, *and close such estate as expeditiously as is compatible with the best interests of parties in interest.*" 11 U.S.C. § 704(1) (emphasis added). Hall and Dallas Spring contend that at the beginning of this case, the Chapter 7 Trustee had a duty to investigate the Debtor's petition and determine whether there had been any previous filings. If such an investigation occurred, argue Hall and Dallas Spring, the Chapter 7 Trustee would have realized that the Debtor qualified for dismissal under Section 109(g)(2). As a result, the Chapter 7 Trustee's duty pursuant to Section 704(1) would have been to request dismissal of the Debtor's bankruptcy case and allow creditors to go forward with their state law remedies in either December 2002 or January 2003.

³ See 11 U.S.C. §§ 704(1), (2), (4), and (7).

⁴ See 11 U.S.C. § 728(b)("[T]he trustee shall make tax returns of income for the estate of an individual debtor in a case under this chapter or for a debtor that is a corporation in a case under this chapter only if such estate or corporation has net taxable income for the entire period after the order for relief under this chapter during which the case is pending.").

⁵ See In re Blurton, 334 B.R. 602, 607 (Bankr. W.D. Tenn. 2005) ("A trustee has a statutory duty to preserve the estate and make the largest possible disbursement to a debtor's creditors.").

When the Debtor filed this case, the Chapter 7 Trustee's duties and actions were governed by an objective, reasonable person standard that carried an element of discretion. *See In re Rollins*, 175 B.R. 69, 74 (Bankr. E.D. Cal. 1994) ("A trustee's duty of care to creditors and the debtor is measured and defined by the care and skill a man of ordinary prudence would exercise in dealing with his own property.") (citations and quotations omitted); *In re Hutchinson*, 132 B.R. 827, 832 (Bankr. M.D.N.C. 1991) ("[T]he measure of care, diligence and skill required of a bankruptcy trustee differs from that required of ordinary trustees and other fiduciaries. Because of the complexity of bankruptcy proceedings, bankruptcy trustees are vested with considerable discretion.") (citations omitted). The Chapter 7 Trustee relied on the opinion of United States District Judge Alaimo in *White v. Associates Commercial Corp. (In re White)*, CV 286-058 (S.D. Ga. 1986), which stated that a court's application of Section 109(g)(2) is discretionary. Although I granted Halls' later motion to dismiss, the holding in *White* was precedent that the Chapter 7 Trustee could legitimately rely upon at the time the case was filed. Therefore, it was reasonable for the Chapter 7 Trustee to conclude that the best course of action at that time would be to preserve and collect the Debtor's property in December 2002 and January 2003 for the benefit of creditors to prevent the estate's piecemeal dismemberment.

Furthermore, it should be noted that in his December 2, 2002, motion, Hall did not move to dismiss the case but instead moved for relief from the automatic stay. *See* Dckt. No. 4 (December 2, 2002). In addition, Hall objected to the sale of real property on March 28, 2003 but did so on the basis of market valuation and not on Section 109(g)(2). *See* Dckt. Nos. 79 (March 28, 2003) and 81 (April 3, 2003). As a result, in light of the

discretion granted to the Chapter 7 Trustee's in administering the estate, his reasonable reliance on Judge Alaimo's opinion in In re White, and Hall's failure to raise the Section 109(g)(2) objection as a basis for dismissal at the beginning of the case when he clearly had the opportunity to do so, it is inappropriate to conclude at this point in the Debtor's case that the Chapter 7 Trustee should be stripped of all compensation because of his actions in December 2002 and January 2003, all of which were approved by this Court after notice and a hearing.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law and because this Court cannot conclude as a matter of law that the Chapter 7 Trustee must be denied compensation and expenses, IT IS THE ORDER OF THIS COURT that the joint motion of Hall and Dallas Spring regarding the Chapter 7 Trustee's compensation and expenses is DENIED IN PART. Although I have determined that the Chapter 7 Trustee is entitled to compensation and expenses, the actual amount that he is entitled to must be addressed in a subsequent order. Therefore, the parties are directed to appear at a subsequent hearing to address any objections, if filed, challenging specific fees and expenses based on the Bankruptcy Code and binding case law. Any such specific objection by Hall or Dallas Spring must be filed by March 22, 2006.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of March, 2006.